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No. 93-1584

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SANDY DIANA HIRRAS,

Petitioner,

versus

NATIONAL RAILROAD PASSENGER CORPORATION, d/b/a AMTRAK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly hold that Petitioner's claim of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* must be submitted to an adjustment board pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*?

2. Did the court of appeals correctly hold that Petitioner's state law claim for intentional infliction of emotional distress is preempted by the Railway Labor Act because it would require the court to construe the collective bargaining agreement between Respondent and Petitioner's union?

RULE 29.1 LIST

The National Railroad Passenger Corporation has no parent companies or subsidiaries, other than wholly owned subsidiaries.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent National Railroad Passenger Corporation ("Amtrak") respectfully submits that this case does not present any issue suitable for consideration by this Court and that the Petition for a Writ of Certiorari should be denied. As discussed in this brief, there is no conflict among the courts of appeals, and the decision of the Court of Appeals for the Fifth Circuit correctly applied the governing statutes and controlling Supreme Court precedent in affirming the dismissal of Petitioner's lawsuit.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas are set forth in Appendices A through C to the petition in this case. All ref-

erences in this brief to those decisions are to the appendices to the petition.

STATUTORY PROVISIONS INVOLVED

The petition, while setting forth selected excerpts from Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, fails to reference § 118 of the Civil Rights Act of 1991, which encourages the arbitration of Title VII claims. Section 118 provides as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, 1991 U.S.C.C.A.N. (105 Stat.) 1071, 1081.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts [1]

Petitioner ("Hirras") was hired by Amtrak on February 20, 1989, as a ticket clerk in San Antonio, Texas. 2R 251 ¶ 2. The terms and conditions of her employment were governed by a collective bargaining agreement. 2R 252 ¶ 4. The collective agreement specifically prohibits Amtrak from "discriminat[ing] against any employee with regard to race, color, religion, *sex*, national origin, age, handicap, or sex orientation." Summary

[1] Although Amtrak filed a motion for summary judgment based on undisputed facts, Petitioner's statement of facts is taken from the bare allegations in her complaint. The undisputed summary judgment evidence, on which Amtrak's statement of facts is based, presents a markedly different scenario than is contained in the complaint.

Judgm. App. Tab 23 Exh. A, unnumbered second page (emphasis added).

Shortly after Hirras began her employment, an Amtrak passenger was arrested in San Antonio for allegedly transporting drugs aboard the train. 2R 252 ¶ 5. Thereafter, employees in the San Antonio ticket office—both male and female—began receiving threatening and harassing anonymous telephone calls. 2R 252-53 ¶¶ 7-11. Hirras also reported to her supervisor an anonymous, vulgar note on her car windshield and obscene, spray-painted graffiti on the baggage room door at the San Antonio station. 2R 254-55 ¶¶ 19, 24. Amtrak conducted a thorough investigation of the calls, the note, and the graffiti, including calling in various law enforcement agencies to conduct their own investigation, but no suspects were identified. 2R 253-56 ¶¶ 12-18, 21-23, 26-29.

During her brief period of active employment, Hirras also reported that a co-worker (Jimmy Southwicke) had made two lewd comments to her. 2R 260 ¶ 45. Based on this report, Amtrak initiated disciplinary proceedings against Southwicke in accordance with the collective bargaining agreement. 2R 260-61 ¶ 48. However, at Hirras's request, the charges against Southwicke were dropped. 2R 261 ¶ 49.[2]

On June 11, 1989, Hirras took a medical leave of absence, allegedly as a result of the incidents at work. 3R 724 ¶ IX. Hirras then filed a charge of sex discrimination with the Equal Employment Opportunity Commission. She thereafter brought suit under Title VII for sexual harassment and under state law for negligent and intentional infliction of emotional distress based on the alleged harassment.

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[2] Hirras also claimed that three other co-workers were rude to her. 2R 258-59 ¶¶ 37-39. Although none of this alleged conduct was sexual in nature, Amtrak counseled the three co-workers concerning their rudeness, and no further incidents were reported. 2R 260 ¶¶ 46, 47.

B. Statement of Proceedings

On October 11, 1991, the United States District Court (Judge Edward C. Prado) granted Amtrak's motion to dismiss Hirras's state law claims. The court held that (1) the negligent infliction claim must be dismissed because Texas does not recognize that cause of action and (2) the intentional infliction claim must be dismissed because it is preempted by the RLA. Petition 21a-24a.

Amtrak subsequently moved to dismiss the Title VII claim, or, alternatively, for summary judgment on the merits. On November 13, 1992, the district court (Judge Walter S. Smith, Jr.) granted the motion to dismiss on the ground that Hirras's Title VII claim must be arbitrated under the RLA. Petition 15a-20a. The court did not reach the merits of Amtrak's motion for summary judgment, but instead denied it as "moot." Petition 20a.

On January 7, 1994, the Fifth Circuit (Chief Judge Politz and Judges Reavely and Emilio Garza) affirmed the district court's decisions. The court first noted that a claim must be submitted to arbitration under the RLA if it " 'is founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective agreement.' " Petition 4a (*quoting Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945)). The court also acknowledged that " 'there is no statutory barrier to submitting [to the National Railroad Adjustment Board ("NRAB")] questions involving the interpretation of statutes or case law.' " Petition 10a (*quoting Richmond, F. & P. R.R. v. Transportation Communications Int'l Union*, 973 F.2d 276, 279 (4th Cir. 1992)). Then, applying this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) to the facts of this case, the court concluded that Hirras's Title VII claim of sexual harassment must be submitted to an RLA arbitrator. In reaching this conclusion, the court emphasized that "§ 118 of the 1991 Civil Rights Act encourages the use of 'alternative means of dispute

resolution,' including arbitration, to resolve disputes arising under Title VII." Petition 7a-8a.[3]

The Fifth Circuit also affirmed the district court's ruling that Hirras's state intentional infliction claim is preempted by the RLA because "[t]o properly adjudicate Hirras's claim, the district court would have to construe the collective bargaining agreement to determine what actions Amtrak was required to take in response to Hirras's complaints that she was being harassed." Petition 13a-14a. The court further concluded that "Hirras's claim and desired remedies implicate provisions in the collective bargaining agreement relating to 'promotion, assignments and displacements, seniority, sick leave, leave of absence, return from leave of absence or temporary assignment, and fitness for duty physical examinations.' " Petition 14a n.19 (*quoting* district court's decision of October 11, 1991 [Petition 24a]).

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[3] Amtrak also asserted its summary judgment motion on the merits as an alternative ground for affirming the district court's judgment; however, the Fifth Circuit did not address that argument.

REASONS FOR DENYING THE WRIT[4]

Although Hirras's petition questions the Fifth Circuit's judgment affirming dismissal of both her Title VII and intentional infliction claims, she has briefed only the Title VII question. As we show in this brief, none of the arguments presented by Hirras warrant review by this Court. First, there is no conflict in the circuits. Second, the Fifth Circuit's decision is consistent with Supreme Court precedent setting the parameters of RLA arbitration and the strong federal policy favoring arbitration of statutory claims. Third, rather than threatening to disrupt the RLA grievance-arbitration system, the Fifth Circuit's decision fairly accommodates the RLA and Title VII and serves the purposes of both statutes. Fourth, even if the state court decision in *Hawaiian Airlines* correctly stated the test for RLA preemption, the Fifth Circuit's decision in this case properly dismissed Hirras's intentional infliction claim since that claim cannot be decided without construing the collective agreement.

I. THERE IS NO CONFLICT IN THE CIRCUITS.

In arguing that a conflict in the circuits exists sufficient to warrant Supreme Court review, Hirras cites three circuit court opinions. None of these opinions creates a conflict or a reason to supplant the lower courts'

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[4] Amtrak is aware that this Court has granted the petition for a writ of certiorari in *Norris v. Hawaiian Airlines*, 842 P.2d 634 (Haw. 1992), *cert. granted in part*, 114 S. Ct. 908 (U.S. Jan. 21, 1994) (No. 92-2058). Although *Hawaiian Airlines* does not involve the forum selection issue presented in this case, and, as noted *infra*, the holding in this case would stand even if the Hawaii Supreme Court's decision correctly stated the law, Amtrak acknowledges that this Court's decision in *Hawaiian Airlines* could have some impact on this case because the arguments of the parties address the scope of the grievance-arbitration procedure created by the RLA. Should the Court not rule on Hirras's petition before a decision is issued in *Hawaiian Airlines*, Amtrak will promptly file a supplemental brief if the Court's *Hawaiian Airlines* decision is relevant to Hirras's petition.

development of the *Gilmer* principle in the many factual and statutory contexts in which it may arise.

A. In *Bates v. Long Island R.R.*, 997 F.2d 1028 (2d Cir.), *cert. denied*, 114 S. Ct. 550 (1993), the plaintiffs were suing under an entirely different statute: § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accommodation of the RLA with other employment legislation cannot be undertaken categorically, but should be considered on a statute by statute basis. For example, unlike § 504 of the Rehabilitation Act, § 118 of the Civil Rights Act of 1991 specifically encourages arbitration of discrimination claims. Moreover, § 504 and Title VII provide different remedies, procedures and rights. *See* 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved . . . under section [504]."); *Milbert v. Koop*, 830 F.2d 354, 356 (D.C. Cir. 1987) ("By way of contrast [to Title VII], section 504 incorporates Title VI—not Title VII—procedures.").

Further, although the *Bates* decision contains a discussion of *Gilmer*, the factual context is inapposite because there is no indication in the briefs or opinion that the parties had submitted the *statutory* claims to arbitration. The court of appeals' opinion in *Bates* describes a situation where arbitration had occurred, but the statutory claims apparently had not been considered. The *Bates*' court's discussion of *Gilmer* forum selection is *dictum* because in the Second Circuit neither party argued that the statutory claims had been or must be arbitrated. In contrast, in the *Hirras* case, arbitration of the statutory claim was the controlling question, and the collective bargaining agreement itself anticipated the submission of such issues. Indeed, in its brief to the Second Circuit (pp. 24, 25), the railroad in *Bates* argued that "[t]he instant case is set squarely on the collective bargaining agreement" and plaintiffs have "disingenuously characterize[d] their claims as handicap discrimination actions

under Section 504 of the Rehabilitation Act." Unlike the arguments in *Bates*, the Fifth Circuit's decision in this case was based solely on forum selection principles: "Amtrak does not argue that Hirras is barred from recovering Title [VII] damages, but rather that her claim for damages may be pressed only before the NRAB." Petition 11a.

For these reasons, *Bates* does not present " 'a real and embarrassing conflict of opinion and authority between the circuit courts of appeal' " that would warrant granting a writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (*quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

B. Hirras also purports to find a conflict with the decisions in *McAlester v. United Airlines*, 851 F.2d 1249 (10th Cir. 1988) and *Norman v. Missouri Pac. R.R.*, 414 F.2d 73 (8th Cir. 1969). Both cases, however, predated *Gilmer*, and neither case considered the forum selection issue of *where* statutory claims must be decided. The question in *McAlester* was whether the RLA preempted a race discrimination claim under 42 U.S.C. § 1981. *See* 851 F.2d at 1253 ("The RLA does not repeal or preempt claims under § 1981."). *Norman* considered whether a Title VII suit over the classification of employees as train porters rather than brakemen was barred because it presented a dispute "that only the National Mediation Board . . . had jurisdiction over." 414 F.2d at 75. The court held that there was "no representational dispute so as to give the National Mediation Board jurisdiction." *Id.* at 81. Unlike our case, no claim was made in *Norman* that a Title VII claim must be submitted to an RLA arbitrator.

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH CONTROLLING SUPREME COURT PRECEDENT.

A. In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), the Court broadly delineated the types of disputes that must be submitted to RLA grievance-arbitration processes. The Court identified two encompassing categories of claims that must be resolved by RLA procedures: those that relate "to the meaning or proper application of a particular provision [in a collective bargaining agreement] with reference to a specific situation" and those "founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*, e.g., claims on account of personal injuries." *Id.* at 723 (emphasis added). This Court thus made it clear that disputes independent of collective agreements must be arbitrated so long as they are "founded upon some incident of the employment relation." Indeed, this principle is repeated several times in the *Burley* decision.[6]

In *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), this Court reaffirmed the *Burley* analysis by quoting with approval the *Burley*

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[6] *See* 325 U.S. at 724 ("[M]inor disputes . . . inevitably appear in the carrying out of major agreements and policies or *arise incidentally in the course of an employment.* They represent specific maladjustments of a detailed or individual quality.") (emphasis added); *id.* at 724 n.16 (adjustment board handles cases " 'growing out of grievances *or* out of the interpretation or application of agreements' ") (*quoting* Hearings before Comm. on Interstate Commerce on HR 7650, 73rd Cong. 2d Sess. 47 (1934)) (emphasis added); *id.* at 736 (NRAB has jurisdiction "where the grievance arises from incidents of the employment *not covered by a collective agreement*") (emphasis added); *id.* at 736 n.34 (referring to "a grievance arising independently of the collective agreement" and noting that Congress used "generally inclusive language . . . concerning grievances"); *id.* at 738 n.36 (noting that an arbitrable claim can be "found[ed] in a collective agreement *or otherwise*") (emphasis added).

Court's pronouncement that arbitration is required when a " 'claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement.' " 491 U.S. at 303 (*quoting Burley*, 325 U.S. at 723). Thus, contrary to Hirras's suggestion, *Burley* continues to state the controlling legal principles governing the broad scope of RLA arbitration.[6]

Burley's inclusive reading of the RLA arbitration requirements is true to the language Congress used in the RLA to define arbitrable disputes. Section 3 First (i) of the RLA requires the arbitration of "disputes between an employee . . . and a carrier or carriers growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i) (emphasis added). This provision, on its face, clearly delineates two broad categories of disputes that must be arbitrated, one of which —"disputes growing out of grievances"—does not involve the "interpretation or application of agreements." Even

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[6] Hirras's assertion (Petition 18 n.6) that *Conrail* limited *Burley* is belied by both the language of *Conrail* quoted in the text and the character of the *Conrail* status quo dispute. The Court in *Conrail* decided that an employer's unilateral action created a minor dispute, and not a status quo violation (*i.e.*, a major dispute), if it was arguably justified by the collective bargaining agreement. 491 U.S. at 307. It was not necessary for the Court to address specifically other sources of minor disputes, *e.g.*, omitted cases, where the major-minor dispute distinction cannot be an issue.

[7] Hirras (Petition pp. 17-18) suggests that *Burley's* arbitration requirement for claims based on "incident[s] . . . independent of those covered by the collective agreement" is "referring only to claims based on *implied* contract terms." This suggestion makes no sense. As this Court has noted, "collective-bargaining agreements may include implied, as well as express, terms." *Consolidated Rail*, 491 U.S. at 311. Indeed, "the industrial common law—the practices of the industry and the shop—*is equally a part of the collective bargaining agreement* although not expressed in it." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S.

if the Court were inclined to reconsider the application of *Burley* to disputes outside the collective bargaining agreement, Hirras's claim would not provide an appropriate occasion to do so, because the Amtrak collective bargaining agreement specifically prohibits employment discrimination.

B. The Fifth Circuit's decision is consistent with *Gilmer* and its precursors—virtually ignored in Hirras's petition—which endorse arbitration as an appropriate forum for resolving statutory claims. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that claims for violations of the federal antitrust laws must be arbitrated, reaffirming that " 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' " *Id.* at 626 (*quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). The Court concluded that "[t]here is no reason to depart from these guidelines [favoring arbitration] where a party bound by an arbitration agreement raises claims founded on statutory rights" since "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 626, 628.

In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court held that the parties must arbitrate statutory claims under § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 *et seq.*). Then, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court required arbitration of claims under § 12(2) of the Securities Act of 1933 (15 U.S.C. § 77*l*(2)). The Court noted that " 'the old judicial hostility to arbitration' . . . has been steadily eroded over the

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574, 581-82 (1960) (emphasis added). Since implied terms are *part* of the collective agreement, it is a nonsequitur to argue that they are also *independent* of the collective agreement.

years' " and that cases resting "on suspicion of arbitration" have "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 490 U.S. at 480-81 (citations omitted) (*quoting Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

In *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), the Court's most recent decision involving the arbitration of statutory claims, the Court extended its pro arbitration principles to the employment discrimination area and held that a stockbroker must arbitrate a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* In requiring arbitration, the Court "note[d] that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." 111 S. Ct. at 1652. The Court reasoned that such congressional intent "will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Id.* According to the Court, "[t]hroughout such an inquiry . . . 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* (*quoting Moses H. Cone Memorial Hosp.*, 460 U.S. at 24). Since Gilmer did not meet "his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act," 111 S. Ct. at 1657, the Court held that Gilmer must pursue his ADEA claim in an arbitral rather than a judicial forum.

In the wake of *Gilmer*, every circuit to consider the issue has required the arbitration of Title VII claims.[8] And in 1991, Congress itself placed its imprimatur on the arbitration of Title VII claims by specifying in the Civil

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[8] *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

Rights Act of 1991 that arbitration of Title VII claims "is encouraged." *Id.* § 118.

Given all of this, the Fifth Circuit's decision requiring Hirras to use the RLA procedures to arbitrate her Title VII claim is an unsurprising application of *Gilmer* and its precursors. Indeed, Hirras's argument against RLA arbitration would create an anomaly: the thousands[9] of stock broker employees subject to the arbitration requirement imposed by the New York Stock Exchange must arbitrate their Title VII claims, but a railroad employee who is subject to an equally broad arbitration requirement *imposed by Congress* is excused from arbitrating her Title VII claims. Nothing in the RLA or Title VII justifies treating Hirras any differently from the plaintiff in *Gilmer*.

C. The Supreme Court cases on which Hirras bases her petition (pp. 13-22) do not impact the Title VII issue decided by the Fifth Circuit in this case. None of those cases involved the forum selection question of arbitrating statutory claims, and all predated *Gilmer*.[10]

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[9] There are more than 85,000 stockbrokers registered with the New York Stock Exchange. *See NYSE Fact Book 1992 Data* p. 93.

[10] Hirras relies on three RLA cases. As noted in the text that follows, *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987), involved a claim that the RLA in effect preempted damage suits under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq. McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 270 (1958) considered and rejected the claim that as a prerequisite to suing under a veterans' rights statute, an employee must "exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the [NRAB]." *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952) was a suit over a union's imposition of a discriminatory agreement. The Court held that the suit was not foreclosed by the jurisdiction of the National Mediation Board or the NRAB, since the "dispute involves the validity of the contract." *Id.* at 774. The *Howard* case was primarily a suit against a union, over which RLA adjustment boards have no jurisdiction. *See* 45 U.S.C. § 153 First (j), (o) and (p). Hirras also relies on the *Gardner-Denver* line of cases—*Alexander v. Gardner-Denver Co.*, 415 U.S. 36

In her petition, Hirras relies in large part on this Court's decisions in *Buell* and *Gardner-Denver*. However, the petition overlooks the significant differences between the holdings in those cases and the forum selection issue in this case. And it ignores portions of the *Hirras* opinion that distinguished *Buell* and *Gardner-Denver* in several important respects.

Hirras contends that the Fifth Circuit "panel distinguished *Buell* on the weakest of bases: *viz.*, that, unlike Title VII (which applies to employees generally), the statute at issue in *Buell*—the FELA—applies *solely to railroad workers*." Petition 16 (emphasis that of Hirras). In making this accusation, Hirras disregards pertinent parts of the court of appeals' opinion. The Fifth Circuit principally distinguished *Buell* because the railroad there was seeking to *eliminate* the FELA cause of action whenever the employee's injury was caused by workplace defects that could be corrected through RLA arbitration proceedings. The court's opinion contrasted the claim preclusion issue in *Buell* with the forum selection issue in *Hirras*, stating "Amtrak does not argue that Hirras is barred from recovering Title [VII] damages, but rather that her claim for damages may be pressed only before the NRAB." Petition 11a. Hirras also fails to advise the Court that the Fifth Circuit distinguished *Buell* because "Title VII, unlike the FELA, encourages parties to resolve employment discrimination suits through arbitra-

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(1974), *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984). Those cases did not arise under the RLA. Rather, they involved the preclusive effect of arbitration awards where the arbitrator's authority derived solely from the contract and the claim submitted was for violation of the contract. In contrast, "the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself." *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 323 (1972).

tion." *Id.* (*citing* § 118 of the Civil Rights Act of 1991).[11]

In relying on *Gardner-Denver*, Hirras fails to acknowledge the differences which distinguish that case, and others like it, from the forum selection issue in this case. First, as the *Gilmer* Court noted, the *Gardner-Denver* line of cases "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims [but instead] involved the quite different issue whether arbitration of contract-based claims precluded subseqeunt judicial resolution of statutory claims." *Gilmer*, 111 S. Ct. at 1657. The present case, like *Gilmer*, does not involve issues of claim preclusion, "but rather [whether Hirras's statutory] claim for damages may be pressed only before the NRAB." Petition 11a.

Second, in *Gilmer*, the Court noted that "because the arbitration [in *Gardner-Denver* and its progeny] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings" and there was "tension between collective representation and individual statutory rights." *Gilmer*, 111 S. Ct. at 1657. *Gardner-Denver* involved an arbitration provision in a collective agreement under § 301 of the Labor-Management Relations Act (29 U.S.C. § 185), where the employee could only file and prosecute a grievance through his union representative. 111 S. Ct. at 58 n.19. In contrast, as noted by the Fifth Circuit, "the RLA guarantees Hirras the right to present her claim, either with or without union involvement, to the NRAB." Petition 10a (*citing* 45 U.S.C. § 153 First (j) and *Burley*, 325 U.S. at 736-38).

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[11] Contrary to the characterization in Hirras's petition, the fact that the FELA applies only to railroads does not provide a "flimsy" basis for distinguishing *Buell*. Indeed, because the FELA applies only to railroads, a finding in *Buell* that the RLA forecloses FELA lawsuits whenever the condition that caused the injury can be challenged through arbitration would have rendered that statute largely meaningless—a change Congress could not have intended.

Third, the *Gilmer* Court distinguished *Gardner-Denver* and its progeny because those cases were not decided under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "which . . . reflects a 'liberal federal policy favoring arbitration agreements.'" *Gilmer*, 111 S. Ct. at 1657 (*quoting Mitsubishi*, 473 U.S. at 625). Indeed, the Court specifically repudiated the "'mistrust of the arbitral process'" expressed in *Gardner-Denver*. 111 S. Ct. at 1656 n.5 (*quoting McMahon*, 482 U.S. at 231-32). As noted by the Fifth Circuit, "the RLA, like the FAA, reflects a liberal federal policy favoring arbitration." Petition 10a. *See, e.g., Pennsylvania R.R. v. Day*, 360 U.S. 548, 554 (1959) (Court noted its "consistent regard for the importance of having disputes between railroad employees and carriers settled by the administrative Board which Congress established for that purpose").[12]

III. THE FIFTH CIRCUIT'S DECISION PROMOTES THE POLICIES OF BOTH TITLE VII AND THE RLA.

It cannot be disputed that the RLA embodies a strong federal policy that grievances of railroad employees must be arbitrated before the tribunal established by Congress. The RLA provides the "mandatory, exclusive, and comprehensive system for resolving grievance disputes," *Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R.*, 373 U.S. 33, 38 (1963), and "[t]his Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board," *Gunther*

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[12] Hirras (Petition 22) notes that the FAA does not apply to contracts of employment of railroad workers. This is a distinction without significance. Although the FAA does not provide federal jurisdiction to enforce a railroad employee's duty to arbitrate disputes, the RLA specifically mandates compulsory arbitration of disputes between railroads and their employees and thereby provides a statutory basis, equivalent to that in the FAA, for enforcing the duty to arbitrate.

v. San Diego & A.E. Ry., 382 U.S. 257, 263 (1965). Likewise, it cannot be disputed that the arbitration of Title VII claims is favored since Congress has expressly "encouraged" the use of arbitration to resolve Title VII claims. Civil Rights Act of 1991 § 118. Accordingly, the Fifth Circuit's decision requiring Hirras to arbitrate her Title VII sexual harassment claim serves the purposes underlying both statutes.

The plethora of Adjustment Board awards cited in Hirras's petition (pp. 22-25) does not alter this reality. Every award cited by Hirras was issued prior to this Court's decision in *Gilmer*—at a time when the state of the law was that arbitration of Title VII claims was not required and would not even be given judicial deference. Indeed, the fact that a dissent based on *Gardner-Denver* occurred in the one arbitral decision cited by Hirras in which a statutory claim of discrimination was considered (Petition 24 n.11), reinforces the fact that the collective thinking of arbitrators at the time—based on pre-*Gilmer* Supreme Court pronouncements—was that statutory discrimination claims were for the courts. *Gilmer* and the Civil Rights Act of 1991 have altered this mind-set. Furthermore, there is no basis for believing that RLA arbitrators cannot decide Title VII claims. As the Fifth Circuit noted, "RLA arbitrators are just as competent as the New York Stock Exchange arbitrators in *Gilmer* and *Alford* to resolve statutory claims of discrimination." Petition 10a.

Moreover, RLA arbitrators do not sit to decide the jurisdictional parameters of the categories of disputes that Congress has delegated to them for adjudication. Rather, the question of what disputes must be arbitrated is for the courts. *See AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 651-52 (1986).

IV. REGARDLESS OF THE OUTCOME IN THE *HAWAIIAN AIRLINES* CASE, THE FIFTH CIRCUIT'S RULING ON HIRRAS'S INTENTIONAL INFLICTION CLAIM IS CORRECT.

Hirras's petition does not brief her contention that this Court should review the Fifth Circuit's holding that her state law intentional infliction claim is preempted by the RLA. However, she asserts that the question presented by the dismissal of her intentional infliction claim "is identical in its substance to the questions that this Court has agreed to hear and resolve in *Hawaiian Airlines*" and that "[t]he only difference is that the applicable state law claim in *Hawaiian Airlines* is based on the Hawaii common law of wrongful discharge while here the state law claim is based on the Texas common law of intentional infliction of emotional injury." Petition 8. Hirras's arguments in this regard are flawed.

The basic holding of the Hawaii Supreme Court was that the discharge claim in that case was "not dependent on an interpretation of . . . any . . . provision of the [collective bargaining agreement]." *Hawaiian Airlines*, 842 P.2d at 645. That is not true in Hirras's case. Hirras's intentional infliction claim is essentially the same as her sexual harassment claim: she was the subject of anonymous phone calls and a note and graffiti from unknown persons and comments from co-workers. "She informed her supervisors but nothing was done. The supervisor failed to prevent the sexual harassment and did not provide a non-hostile environment." Petition 27a ¶ VIII, 29a ¶ XII.

Given Hirras's factual allegations, it is impossible to resolve her intentional infliction claim without interpreting the collective bargaining agreement. As the Fifth Circuit held, "[t]o properly adjudicate Hirras's claim, the district court would have to construe the collective bargaining agreement to determine what actions Amtrak was required to take in response to Hirras's complaints that she was

being harassed." Petition 13a-14a. The collective agreement limits Amtrak's ability to make accusations against or to discipline employees, absent reasonable cause; accordingly, the provisions of the contract are an indispensable ingredient in evaluating the appropriateness of Amtrak's response. The fact that the one co-worker who made sexual comments to Hirras was charged under the collective agreement (and that the proceedings were terminated at Hirras's request) underscores the inextricable relationship of Hirras's intentional infliction claim and the terms of the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, Amtrak submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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